No. 04-1359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PUBLIC CITIZEN CRITICAL MASS ENERGY
AND ENVIRONMENT PROGRAM and
NUCLEAR INFORMATION AND RESOURCE SERVICE,

Petitioners,

v.

UNITED STATES and THE UNITED STATES
NUCLEAR REGULATORY COMMISSION,

Respondents,

On Petition for Review of a Final Rule Issued by
Respondent Nuclear Regulatory Commission

BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, petitioners Public Citizen Critical Mass Energy and Environment Program (Public Citizen) and Nuclear Information and Resource Service (NIRS) state that neither of them has a parent corporation, nor is either of them owned, wholly or in part, by any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATORY AND ADMINISTRATIVE MATERIALS

OTHER MATERIALS

JURISDICTIONAL STATEMENT

Petitioners Public Citizen and Nuclear Information and Resource Service (NIRS) seek review of a final rule issued by the United States Nuclear Regulatory Commission (NRC) on January 14, 2004. *See Changes to Adjudicatory Process; Final Rule*, 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rule revised 10 C.F.R. Part 2, the NRC rules governing adjudicatory hearings under Section 189 of the Atomic Energy Act (AEA), 42 U.S.C. § 2239, to eliminate the right to an "on the record" hearing in most agency adjudicatory proceedings. This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(4).

Pursuant to 28 U.S.C. § 2344, Public Citizen and NIRS filed their petition for review on February 20, 2004, in the D.C. Circuit. The petition for review was timely because it was filed within 60 days of entry of the final rule. *Id.* Venue was initially proper in the D.C. Circuit because both Public Citizen and NIRS maintain their principal offices in the District of Columbia. 28 U.S.C. § 2343. Because Citizens Awareness Network, Inc. (CAN) had previously filed in this Court the first petition for review of the NRC order at issue, and because the Public Citizen/NIRS petition was not filed within 10 days of the order, the NRC was required to file the record in this Court. 28 U.S.C. § 2112(a)(1). Pursuant to 28 U.S.C. § 2112(a)(5), the D.C. Circuit was required to transfer the Public

Citizen/NIRS petition to this Court, which it did on March 3, 2004. By Order of April 28, 2004, this Court consolidated the two petitions for review.

As set forth in the declarations attached to this brief, petitioners are membership organizations whose organizational missions include educating the public about potential dangers posed by nuclear energy facilities and protecting their members from those potential dangers by participating in agency rulemaking and licensing proceedings involving nuclear safety issues. Both petitioners participated in the rulemaking at issue and are participating in licensing proceedings conducted pursuant to the new rule. Both have members who live near nuclear facilities licensed by the NRC and who may be exposed to hazardous releases of radiation in the event of an accident, providing petitioners standing to participate in agency licensing proceedings involving those nuclear facilities. Petitioners and their members have been injured by promulgation of the final rule, which limits their procedural rights in the agency proceedings in which they participate. Thus, petitioners Public Citizen and NIRS, both in their own right and as representatives of the interests of their members, *see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), are "parties aggrieved" within the meaning of 28 U.S.C. § 2344 and have suffered injury-in-fact sufficient to give rise to Article III standing as a result of the NRC order at issue.

STATEMENT OF THE ISSUES

I. Whether the NRC's final rule abolishing formal on-the-record hearings in nuclear reactor licensing proceedings is contrary to law because Section 189a of the AEA provides the affected public the right to an on-the-record hearing in reactor licensing proceedings.

II. Whether the NRC's final rule abolishing formal on-the-record hearings in nuclear reactor licensing proceedings is arbitrary and capricious because

a) it reverses, without sound basis or adequate explanation, the NRC's long-standing position that the AEA requires formal hearings in reactor licensing proceedings;

b) it retains formal hearings for high level waste repository proceedings to promote public confidence and protect health and safety, while undermining those same interests with regard to reactor licensing proceedings; and/or

c) it eliminates cross-examination of expert witnesses based on the unsupported assumption that cross-examination of experts is unimportant, even though cross-examination is well-suited for testing the conclusions of expert witnesses, and cross-examination of industry

experts in NRC licensing proceedings is an important tool for public participation.

STATEMENT OF THE CASE

Public Citizen and NIRS petition for review of a rule promulgated by the NRC that abolishes formal hearing rights in nuclear reactor licensing proceedings. The rule violates Section 189a of the AEA, 42 U.S.C. § 2239(a), by denying the affected public its statutory right to an on-the-record hearing that comports with the requirements of Sections 5, 7, and 8 of the APA, 5 U.S.C. §§ 554, 556, & 557. Additionally, the NRC acted arbitrarily and capriciously in promulgating the rule, in violation of the APA, 5 U.S.C. § 706(2)(A).

The rule at issue changes 10 C.F.R. Part 2, the NRC rules governing adjudicatory hearings under section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a). The new Part 2 was promulgated through notice and comment rulemaking. The NRC published a Notice of Proposed Rulemaking on April 16, 2001, 66 Fed. Reg. 19610, before issuing the new Part 2 as a final rule on January 14, 2004. 69 Fed. Reg. 2182.

STATEMENT OF FACTS

The AEA grants the NRC the authority to license nuclear facilities while obligating the NRC to protect the health and safety of the public. *See* 42 U.S.C. §§

2133(d) & 2134(d) (no license may issue where it "would be inimical to the common defense and security or to the health and safety of the public"). To protect public safety, Congress promulgated Section 189a of the Atomic Energy Act of 1954 (AEA), to require the NRC to "grant a hearing upon the request of any person whose interest may be affected" by such nuclear licensing proceedings. 42 U.S.C. § 2239(a)(1)(A). Pursuant to Section 189a, affected members of the public, including petitioners, have intervened in NRC licensing proceedings to contest, on safety-related grounds, industry applications for new and amended licenses to build and operate nuclear power plants and other facilities. Such citizen intervenors have often been instrumental in identifying and leading to the correction of major safety problems. *See* JA 758-769 (listing examples of citizen interventions that contributed significantly to public safety).

For decades, consistent with its obligation to protect the health and safety of the public, the NRC and its predecessor agency, the Atomic Energy Commission (AEC), provided a full range of trial-type procedures for reactor licensing cases. These procedures, set forth in 10 C.F.R. Part 2, Subpart G, included the right to engage in discovery and to cross-examine witnesses, including experts. These procedures complied with the APA requirements for on-the-record hearings. *See* 5 U.S.C. §§ 554, 556, & 557.

The Commission took the view that such procedures were not only desirable as a matter of policy, but required by Section 189a. For example, a 1989 Memorandum prepared by the NRC's Office of General Counsel (OGC), JA 798-830, concluded from the legislative history of the 1954 Act and subsequent amendments that Congress intended that Section 189a provide formal on-the-record hearings. The same Memorandum noted that "the AEC, and later the NRC, have long interpreted Section 189 as requiring formal hearings for licensing proceedings," and cited numerous documents confirming that this was the agency's longstanding position. JA 826. The NRC's General Counsel thus concluded:

> In sum, Section 189a does not explicitly require a formal, trial-type hearing, but its legislative history does suggest that formal hearings are required for power reactor licensing cases. Section 191 and the legislative history of that [amendment] strongly indicate that Congress intended the hearings afforded by Section 189a in power reactor licensing cases to be "on the record." The 7th Circuit has held that Section 189a does not require formal hearings in all licensing proceedings, but the decision was carefully limited to materials licensing. Also, the D.C. Circuit has twice suggested that formal hearings are required in facilities licensing proceedings and there has been a longstanding agency interpretation that Section 189a requires formal hearings in nuclear power plant adjudications.

JA 829.

A decade later, the NRC began considering its options for "deformalizing" many of the hearings required by Section 189a, JA 1, for reasons that were set

forth in the most general terms in a paper from the OGC to the Commission. *See, e.g.,* JA 7 (claiming that unidentified "observers" are "skeptical" that formal adjudication is appropriate in licensing cases, and concluding, without support, that less formal proceedings could mean "greater efficiency"). While acknowledging that it had been the AEC's "official position that on-the-record hearings were not merely permissible under the Atomic Energy Act but required," JA 3, and that the NRC for many years "did not depart from the longstanding assumption that the Atomic Energy Act requires on-the-record hearings," JA 5, the OGC reversed course in 1999 and advised the NRC that Section 189a does not mandate formal adjudicatory proceedings. However, OGC cautioned the NRC that it could not be assured of a litigation victory were it to promulgate rules providing less than a formal hearing in reactor licensing cases without seeking statutory authority from Congress. JA 10.

Accordingly, the OGC set forth various options for the NRC to consider if it desired to deformalize some types of licensing cases, while declining to make a formal recommendation. JA 16-20. Simultaneously, the OGC informed the NRC that the Atomic Safety and Licensing Board Panel (ASLBP), the Commission body that presides at licensing adjudications, disagreed with the OGC both as to whether Section 189 requires formal hearings for reactor licensing cases and as to the

usefulness of formal adjudications in the licensing process. JA 87-95. Indeed, the ASLBP memorandum declared that, contrary to the OGC's new position, "the better legal view of the meaning of section 189a vis a vis formal hearings in power reactor licensing cases is presented in the January 1989 OGC memorandum," which had concluded that Section 189a requires formal hearings. JA 88. The ASLBP reiterated this position in a later memorandum to the NRC, JA 97-98, in which it warned the Commission that any move to abolish discovery in licensing proceedings "could have a pronounced impact on the way licensing adjudications are conducted, to say nothing of the way the process is perceived by litigants." JA 98. The ASLBP concluded that "a preferable approach to curbing and eliminating discovery delays and costs is better hearing management." JA 99.

Despite the Commission's longstanding precedent to the contrary and the opposition of the ASLBP, the NRC voted in early 1999 to endorse the novel view that Section 189a does not mandate on-the-record hearings, and it called for a rulemaking to deformalize most NRC licensing proceedings. JA 102. The comments of individual Commissioners reflected their uncertainty regarding their new position on whether abolishing formal hearings violates Section 189a. For example, Commissioners Dicus, Diaz, and McGaffigan called for rulemaking while encouraging the pursuit of legislation to establish that the NRC has the

discretion to eliminate formal hearings. JA 104, 106, 109. Similarly, Commissioner Merrifield specifically acknowledged "the litigation risk associated with moving forward with such an extensive change." JA 113. Nevertheless, the Commission chose to bypass Congress and attempt to achieve, through rulemaking, a radical change in the licensing process. The NRC did not, however, articulate any reason why it desired to move toward informal proceedings, other than a generalized notion that to do so would improve efficiency. JA 101-115.

As the Commission embarked on the process that led to the final rule at issue, it held a facilitated meeting with certain invited stakeholders, to seek their views on whether there were problems with the hearing process and whether deformalizing certain hearings might solve those problems. Although industry representatives expressed a desire for greater "efficiency" because the licensing process takes too long, JA 251, there was widespread agreement among those at the meeting that there had been no demonstration of the need for a change in hearing procedures, JA 138, 277, nor any demonstration that informal hearings would shorten the licensing process. JA 338, 368. A recurring theme throughout the meeting was the need for a study to identify the causes of any inordinate delay in licensing proceedings before attempting to cure any such problem by

circumscribing the hearing rights of citizen intervenors. JA 160e, 169, 173, 187, 268, 332, 336, 345-47.

Indeed, numerous participants urged the Commission not to deformalize reactor licensing hearings based on an unsupported assumption that formal hearing procedures were to blame for the slow pace of some licensing proceedings or that informal procedures would expedite the resolution of such matters. Many participants cautioned the NRC that circumscribing hearing rights would eliminate meaningful public participation, reduce health, safety, and environmental protection, and erode public confidence. JA 160h, 225, 353, 356. Despite these warnings and the near-universal call for a study, the OGC recommended that the NRC proceed with a rulemaking "to substantially modify the NRC's regulations governing the conduct of hearings." JA 379. Significantly, the OGC's summary of the comments raised by the participants at the facilitated meeting did not mention the need for a study to determine whether there existed a problem of unnecessary delay and unproductive litigation or whether a move to informal hearings would alleviate any such problem. JA 404-409.

The OGC recommended that the NRC commence a rulemaking that would result in the use of informal hearing procedures in almost all adjudications, including reactor licensing proceedings. JA 379-81. Under the OGC's proposal,

the informal procedures would be set forth in a revised 10 C.F.R. Part 2, Subpart L, and would provide for no discovery beyond initial disclosures and no cross-examination of witnesses by the parties. JA 384-85. The informal procedures of Subpart L would become the norm for almost all proceedings, while the formal procedures of Subpart G, which had applied to all reactor licensing proceedings and which provide for full discovery and the cross-examination of witnesses, would be retained for use in the small set of cases excepted from Subpart L. JA 380-81.

The ASLBP reviewed and commented on the OGC proposal, reiterating its view that Section 189a requires on-the-record hearings, JA 552, and explaining in detail "the very valuable role party cross-examination plays in the hearing process." JA 562. Rejecting the views of the ASLBP, the NRC approved the OGC's recommendation and authorized the promulgation of a proposed rule to deformalize adjudicatory procedures, JA 579, although Chairman Meserve questioned whether informal procedures would prove more efficient than formal procedures, JA 582, and expressed reservations about eliminating cross-examination and discovery. JA 585-588. The proposed rule was published on April 16, 2001, at 66 Fed. Reg. 19610. JA 613-675. Under the proposal, the use of the informal procedures in a revised Subpart L would become the norm, and the

formal procedures of Subpart G, including the right to engage in discovery and cross-examine witnesses, would be retained for a narrow set of cases excepted from the new Subpart L. JA 624.

In response, the NRC received 1,431 comments, all but 9 of which opposed the proposed changes. 69 Fed. Reg. 2190. The opposition focused on the lack of statutory authority to abolish on-the-record hearing procedures in reactor licensing cases and argued that the proposed elimination of discovery and cross-examination would undermine safety and public confidence. JA 678-79, 705-17, 746-47, 769-77.

Rejecting the comments of those opposed to the proposed changes, the NRC promulgated its final rule. Under the final rule, the formal hearing mechanisms of 10 C.F.R. Part 2, Subpart G, including discovery and cross-examination, which governed all reactor licensing cases for nearly fifty years, now apply in only four circumstances: 1) licensing of uranium enrichment facilities; 2) licensing of a high-level waste (HLW) geologic repository; 3) enforcement matters (unless the parties agree to use more informal hearing procedures); and 4) and specific aspects of nuclear power plant licensing proceedings in which the presiding officer finds that resolution of an issue of material fact depends on an assessment of the credibility, motive, or intent of a fact witness. 69 Fed. Reg. 2191.

The informal procedures of 10 C.F.R. Part 2, Subpart L, which allow no discovery beyond initial disclosures and abolish the right to cross-examine opposing witnesses, apply to all reactor licensing proceedings (with the narrow exception listed in #4 above). Thus, by exempting reactor licensing hearings from the procedures of Subpart G, the final rule abolishes discovery and prohibits cross-examination by citizen intervenors. The loss of these longstanding elements of NRC adjudicatory practice has severely curtailed, if not eliminated, the possibility of meaningful participation by affected members of the public, thereby undermining health and safety.

SUMMARY OF THE ARGUMENT

The NRC's new rule is contrary to law because Congress intended that Section 189a of the AEA guarantee formal hearing rights to members of the public whose interests might be affected by the NRC's nuclear reactor licensing proceedings. This Court has held that a statute need not explicitly call for an "on the record" hearing to require application of the APA's formal hearing procedures. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978). Rather, in the absence of contrary congressional intent, this Court presumes that adjudicatory hearings subject to judicial review must be on the record. *Id.* at 877.

Further, the legislative history of Section 189a and the enactment of later amendments to the AEA indicate that Congress intended to guarantee APA hearing rights in reactor licensing cases. Congress was well aware that the Commission interpreted Section 189a to require on-the-record hearings, and Congress ratified that interpretation by passing legislation that carved out exceptions to the application of certain APA procedures. Congress also ratified the Commission's interpretation of Section 189a by rejecting proposals to legislatively overrule that interpretation. Because the new rule is at odds with the intent of the statute, it must be set aside.

Even if the new rule were not contrary to law, the NRC acted arbitrarily and capriciously in adopting it. The NRC has departed from nearly fifty years of precedent without offering a rational basis for the total reversal of its longstanding position. In fact, the conclusory explanations the NRC offers in an attempt to support its rule change, *i.e.,* that formal hearings cause licensing proceedings to take too long, are based on unsupported assumptions and anecdotes. The NRC has opted to retain formal hearing procedures in HLW repository proceedings for policy reasons that apply with equal force in the context of reactor licensing, yet the NRC never offers a rational explanation for its differing treatment of these types of cases. Finally, the NRC has banned the cross-examination of expert

witnesses for unsupported reasons that run contrary to the experience of its own licensing board and the adversary system in general.

STANDARD OF REVIEW

The Court reviews the final rule to determine whether it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

ARGUMENT

I. THE NRC'S DECISION TO ABOLISH FORMAL HEARINGS IN REACTOR LICENSING CASES IS CONTRARY TO LAW BECAUSE SECTION 189a OF THE AEA REQUIRES ON-THE-RECORD HEARINGS.

The NRC's new rule reversing its longstanding conclusion that Section 189a requires on-the-record hearings with respect to reactor licensing proceedings should be vacated because it is "not in accordance with law." 5 U.S.C. § 706(2)(A). Section 189a of the AEA, 42 U.S.C. § 2239(a)(1)(A), states in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Section 181 of the AEA, 42 U.S.C. § 2231, provides for the application of the Administrative Procedure Act (APA) to all agency action. Sections 5, 7, and 8 of the APA, 5 U.S.C. §§ 554, 556, & 557, set forth procedures for adjudications "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554. These procedures include, where necessary, depositions and cross-examination of witnesses. 5 U.S.C. § 556(c)(4) & (d). The preamble to the NRC's final rule makes clear that the agency's own view is that the new Part 2 procedures do not satisfy the requirements of a formal on-the-record hearing — hence the need for the NRC's extensive effort to demonstrate that Section 189a licensing hearings need not be on the record.[1] 69 Fed. Reg. 2182-86.

Section 189a need not explicitly call for an "on the record" hearing to require application of the APA's formal hearing procedures. Rather, the nature of the hearing Congress intended to provide will determine whether APA on-the-record hearing requirements apply. *See Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978); *accord Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 46 (1st Cir. 2001). Here, contrary to the NRC's newly adopted view, the

[1] Moreover, with respect to the licensing of uranium enrichment facilities, the one instance where the NRC acknowledges the existence of an express statutory requirement that hearings be "on the record," the agency provided for continuing application of Subpart G procedures, recognizing that the new Subpart L procedures would not suffice. *See* 69 Fed. Reg. 2183.

hearing rights created by Congress require application of formal, on-the-record procedures.

A. Because Section 189 Hearings Are Adjudicatory in Nature and Subject to Judicial Review, APA Hearing Standards Are Presumed to Apply in the Absence of Contrary Congressional Intent.

In *Seacoast*, this Court held that it would "presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." 572 F.2d at 877. The Court explained that, because agency hearings serve different functions in the rulemaking and adjudicatory contexts, the "crucial" part of Section 554 of the APA is "the requirement of a statutorily imposed hearing." *Id.* Thus, the Court "will place less importance on the absence of the words 'on the record' in the adjudicatory context," than it might in the rulemaking context. *Id.; see also United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-245 (1973) (discussing the distinction between rulemaking and adjudication).

In *Seacoast*, this Court found that the provisions of the APA governing adjudicatory hearings, 5 U.S.C. §§ 554, 556, & 557, applied to the hearings provided by Sections 316 and 402 of the Federal Water Pollution Control Act of 1972 (FWPCA), even though neither FWPCA section stated that the hearing must be "on the record." *Seacoast*, 572 F.2d at 875-878. The Court found that because

the proceedings at issue were conducted to adjudicate disputed facts on which the agency would base its decision to grant or deny a license to a specific applicant, and not to make general policy, the agency hearings were "exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended." *Id.* at 876; *accord Dantran*, 246 F.3d at 46-48 (finding the APA applicable to hearings under Section 354(a) of the Service Contract Act because such proceedings are statutorily mandated adjudications that are adversarial in nature).

Likewise, the hearings required by Section 189a of the AEA are adjudicatory hearings subject to judicial review. *See* 42 U.S.C. § 2239(b)(1). Like the FWPCA hearings at issue in *Seacoast*, Section 189a hearings are used to adjudicate disputed facts on which the NRC bases its decision to grant or deny a license to a specific applicant, and not to make general policy. Thus, under *Seacoast*, this Court will presume that Section 189a hearings require the use of the adjudicatory procedures set forth at 5 U.S.C. §§ 554, 556, and 557, unless there is a clear indication of "a contrary congressional intent." *Seacoast*, 572 F.2d at 878. As shown in the next section, the legislative history of the AEA supports the conclusion that Section 189a hearings are to be conducted in accordance with the APA's formal hearing requirements.

B. The Legislative History of the AEA of 1954 and Its Amendments Reveals That Congress Intended Section 189a Hearings to Be Formal.

The legislative history of Section 189a of the AEA and the construction of its later amendments strongly indicates that Congress intended Section 189a to guarantee APA hearing rights.

1. The legislative history of the 1954 Act shows that Congress intended to guarantee APA hearing rights in licensing proceedings.

Section 189a was added to the AEA by the amendments of 1954. In examining the legislative history of the section, the Court in *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1312 (D.C. Cir. 1984), concluded that Section 189a was drafted "with specificity and precision." As described in *Mothers for Peace*:

> When first proposed, the Atomic Energy Act of 1954 included no provision for hearing rights. After considerable discussion a new section 181 was incorporated in the substitute bill introduced in the House; it provided that "[u]pon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.'" The new provision was faulted, however, for being "too broad, broader than it was intended to [be]." Senator Hickenlooper offered an amendment to restrict the hearing right to specific categories of agency action. The result, a new subsection within section 189, was the substantive equivalent of the modern provision. The Act's legislative history, therefore, reveals the intent of Congress to guarantee hearing rights in *certain* classes of agency action, but not in others.

Id. at 1312-1313 (citations omitted) (emphasis in original).

The fact that Congress, acting with "specificity and precision" after considering a wide range of proposals, explicitly guaranteed hearing rights in licensing proceedings and enshrined those rights in the same section that guarantees judicial review, supports the *Seacoast* presumption that, "unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." *Seacoast*, 572 F.2d at 877.

Further, the only significant discussion of hearings during the debate on the 1954 Act came from Senator Anderson, who stated his belief that "[i]f the basic legislation does require a hearing, a hearing is required by the Administrative Procedure Act." 100 Cong. Rec. 9999-10,000 (July 14, 1954). Senator Anderson went on to explain why the Act should include the right to a formal on-the-record hearing:

> [B]ecause I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everybody can see it. Although I have no doubt about the ability or integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take; and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.

Id. Thus, the legislative history of Section 189a of the 1954 Act shows that Congress intended to guarantee a formal on-the-record hearing if the Commission were to grant a license in the important field of nuclear power.[2]

2. The 1962 amendments to the AEA reflect Congress's intention to subject Section 189a adjudications to APA hearing requirements.

The 1962 amendments to the AEA added Section 191a, 42 U.S.C. § 2241(a). Section 191a authorized the Commission to establish Atomic Safety and Licensing Boards and permitted those Boards to preside at hearings in lieu of hearing examiners and to render final as well as intermediate decisions:

> Notwithstanding the provisions of sections 556(b) and 557(b) of Title 5, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any

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[2] When Section 189a of the AEA was amended in 1957 to add a mandatory hearing requirement for facility licenses, Senator Anderson introduced the Senate bill by quoting his remarks from the debate on the 1954 Act, concluding with the statement that "[a]lmost 3 years have now passed and I believe my words of 1954 are still applicable." 103 Cong. Rec. 3616 (Mar. 21, 1957). Thus, the 1957 Amendments, like those of 1954, were predicated on a desire for formal on-the-record hearings. Again, Congress did not explicitly state the type of hearing required, apparently believing that the requirement of a hearing was sufficient to invoke the APA.

> license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

42 U.S.C. § 2241(a). Because Sections 556 and 557 of the APA apply only to adjudications required to be determined on the record after opportunity for an agency hearing, *see* 5 U.S.C. § 554, Congress would not have needed to begin Section 191a with the language "notwithstanding the provisions of sections 556(b) and 557(b)" unless APA hearing procedures were required under Section 189a.[3]

The NRC argues that the "notwithstanding" clause was unnecessary but that Congress included it to eliminate ambiguity because, as is discussed below, Congress knew that the Commission insisted that Section 189a required on-the-record hearings under 5 U.S.C. §§ 556 & 557. 69 Fed. Reg. 2184. The NRC's argument ignores the principle that a court should avoid interpreting an act in a manner that would render one of its provisions meaningless. *See Allende v. Shultz*, 845 F.2d 1111, 1119 (1st Cir. 1988) ("'A familiar canon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of it

[3] The "notwithstanding" clause was necessary because the APA otherwise allows contested hearings to be considered only by the agency, its members, or an administrative law judge. 5 U.S.C. § 556(b).

meaningless'") (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986)); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

Further, at the time of the 1962 amendments, Congress was well aware that the Commission interpreted Section 189a to require formal hearings for licensing proceedings. For example, "AEC General Counsel Naiden, in a letter dated September 6, 1961 to Mr. Ramey, Executive Director of the Joint Committee on Atomic Energy, stated that 'Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA. For the Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirements.'" *Kerr McGee Corp.*, 15 N.R.C. 232, 273 (1982). Indeed, the NRC readily concedes that the Commission "took the official position that on-the-record hearings were not merely permissible under the AEA but required." 69 Fed. Reg. 2183. That Congress knew the Commission's interpretation and altered the Act in a way that reflected that interpretation, demonstrates that Congress intended that interpretation to continue. *Lindahl v.*

OPM, 470 U.S. 768, 782-83 n.15 (1985); *see also Barnhart v. Walton*, 535 U.S. 212, 1270-71 (2002) (amendment or reenactment of a statute without change to provisions interpreted by the agency provides evidence that Congress intended the agency's interpretation); *Edelman v. Lynchburg College*, 535 U.S. 106, 117-118 (2002) ("By amending the law without repudiating the regulation, Congress suggests its consent to the Commission's practice.").

In addition, that Congress knew the Commission's position and took no action to change the statute can be viewed as "a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress." *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 409 (1961). As the Supreme Court explained, "[i]t may often be shaky business to attribute significance to the inaction of Congress," but it is fair to do so with respect to an issue of statutory construction that was brought clearly and directly to the attention of the Joint Committee of Congress on Atomic Energy, because of the Joint Committee's "peculiar responsibility and place" in the statutory scheme of the AEA. *Id.* at 408-409. Indeed, two of the Joint Committee's consultants "recommended that Congress pass legislation stating that 'the requirement of a hearing in section 189a . . . shall not be deemed to require a determination on the record after opportunity for

agency hearing, within the meaning of section [554] of the [APA].'" *Kerr McGee Corp.*, 15 N.R.C. at 250 (quoting AEC Regulatory Problems Hearings before Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. 57 (1962)). Despite this recommendation, Congress did not enact such legislation, even though it was amending the act and had the opportunity to correct any interpretation it deemed erroneous. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (finding significance in Congress's rejection of legislation that would have overruled agency's interpretation); *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 45 (1983) ("agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation").

3. The enactment of the Nuclear Non-Proliferation Act reinforced Congress's intention that Section 189a adjudications be subject to APA hearing requirements.

Section 304 of the Nuclear Non-Proliferation Act of 1978 (NNPA), 42 U.S.C. § 2155a, provided for the Commission to establish procedures for conducting nuclear export licensing proceedings, including public hearings. The NNPA further provided that such procedures would "constitute the exclusive basis for hearings in nuclear export licensing proceedings before the Commission and, notwithstanding section 2239(a) of this title [Section 189a of the AEA], shall not

require the Commission to grant any person an on-the-record hearing in such a proceeding." 42 U.S.C. § 2155a(c). Congress's use of "notwithstanding" yet again indicates its intention that, absent express statutory authority to use other hearing procedures, on-the-record hearings were required under Section 189a.

C. Although No Court Has Ruled Definitively on the Issue, Several Courts Have Strongly Supported the Proposition That Section 189a Requires On-The-Record Hearings, at Least with Respect to the Reactor Licensing Proceedings at Issue Here.

Although no Court has had to decide whether Section 189a requires on-the-record hearings in reactor licensing proceedings, several have given strong indications that it does. For example, in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1441-42 (D.C. Cir. 1984) (*UCS I*), the Court invalidated an NRC rule on the basis that it denied a hearing guaranteed by Section 189a. Because it was not necessary for the Court in *UCS I* to determine the *type* of hearing required, the Court refrained "from holding outright that section 189(a) requires 'on the record' hearings in licensing adjudications." *Id.* at 1445 n.12. Nevertheless, the Court found that "there is much to suggest" that APA hearing procedures apply. The Court observed that Congress in 1962 had amended the AEA to eliminate the hearing requirement in certain situations, but despite a request that it do so, "it did not alter in any way the existing interpretation or definition of a 189(a) hearing,

thereby apparently reaffirming its intent that 'on the record' procedures apply in licensing." *Id.* The Court also found that in making other amendments to the AEA, Congress had assumed that Section 189 hearings were on the record, and the Court noted that "the NRC has consistently taken the position that section 189(a) calls for 'on the record' hearings in adjudications." *Id.*

The Court in *UCS I* also observed generally that "licensing is adjudication, and when a statute calls for a hearing in an adjudication the hearing is presumptively governed by 'on the record' procedures." *Id.* (citing *Seacoast*, 572 F.2d at 876-77). The D.C. Circuit later qualified this view in light of *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because of its concern that, in cases where congressional intent cannot be determined, such a presumption might impinge on the agency's right to interpret in the first instance an ambiguous statutory reference and to enjoy the deference owed its interpretation.[4] *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989). Although the D.C. Circuit thus rejected the presumption in the abstract, it noted that, even

[4] Although the D.C. Circuit may have retreated from the presumption after *Chevron*, this Court has continued to follow *Seacoast*. *See, e.g., Dantran*, 246 F.2d at 46. Further, as discussed below, the Commission's new interpretation of Section 189a is not entitled to *Chevron* deference.

without the presumption, there is much to suggest that Section 189a requires APA hearing procedures:

> We did not actually rely [in *UCS I*] on the presumption we announced, but rather inferred that Congress intended the use of formal adjudicatory procedures based both upon NRC's unsuccessful efforts to convince Congress to do away with such procedures and upon NRC's consistent position, over a twenty year period, that the statute required formal procedures.

Id. at 1481-82. Thus, *Chemical Waste* suggested that the *UCS I* Court would have reached the same conclusion even without the *Seacoast* presumption, based on the "exceptional circumstances" presented by the NRC's attempt to change its long-standing position through rulemaking after failing to obtain legislative relief. *See id.* at 1482.

One reviewing court has upheld the use of an informal hearing under Section 189a in the context of an amendment to a materials license, but did not reach the issue of whether a formal hearing is required in reactor licensing proceedings. *See City of West Chicago v. NRC*, 701 F.2d 632, 641-42 (7th Cir. 1983). *West Chicago* found that the legislative history of the 1954 Act "sheds little light on the hearing requirement" and that the legislative history of the 1957 and 1962 amendments shows that "Congress was concerned mainly with facilities or reactor licenses" as opposed to materials licenses. *Id.* Therefore, "based on the threadbare legislative

history concerning materials licenses," and "in the context of a statute that distinguishes between the licensing of nuclear materials and nuclear facilities," the Court in *West Chicago* could not conclude that Congress intended to require formal hearings for materials licensing "*[e]ven if the legislative history indicates that formal procedures are required by statute in reactor licensing cases*." *Id.* at 642-43 (emphasis added); *see also Kerr-McGee Corp.,* 15 NRC at 260 (discussing qualitative difference between materials and reactor licensing: "as a general proposition the risks associated with materials licenses are frequently of lesser magnitude than those associated with reactor licenses"). Thus, *West Chicago* is not instructive in this case, because petitioners are challenging the new rule's elimination of formal hearings in reactor licensing matters.[5]

[5] The NRC has only once argued that Section 189a does not require on-the-record hearings in the reactor licensing context. The agency did so before the D.C. Circuit sitting *en banc*, but the Court did not address it because "the Commission's arguments on this score were not raised before the panel, nor advanced during the rulemaking process." *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1180 (D.C. Cir. 1992).

D. The NRC's New Interpretation of the Section 189a Hearing Requirement is Not Entitled to *Chevron* Deference.

The Commission's novel interpretation of Section 189a is not entitled to *Chevron* deference. First, as explained above, the ordinary tools of statutory construction show that Congress intended that Section 189a require on-the-record hearings; thus, any contrary construction by the NRC must be rejected, and any rule contrary to the statute must be vacated. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (a court must use the traditional tools of statutory construction to ascertain Congress's intent, and the agency's use of those same tools is not entitled to special weight).

Second, even if the agency's new construction of Section 189a were not in conflict with the expressed intent of Congress, the new interpretation would not be entitled to deference because an agency interpretation of "a statute that relates to matters outside the agency's area of expertise [is] entitled to no special deference." *Dantran*, 246 F.3d at 48 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990)). The issue in *Dantran* was whether a debarment hearing provided under § 354(a) of the Service Contract Act (SCA) was an "adversary adjudication" within the meaning of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(b)(1)(C), which in turn defines such an adjudication as one under § 554 of the APA. The

Department of Labor (DOL) argued that the debarment hearing was not an adjudication within the coverage of the EAJA. This Court rejected the DOL's interpretation of the SCA's hearing requirement, finding that the hearing under § 354(a) of the SCA met the requirements of an on-the-record hearing under the APA and thus the EAJA applied, based on the Court's view of the substantive nature of the hearing Congress intended to provide under the SCA. This Court did not give deference to the agency's position that the SCA hearing requirement did not mandate an adversary adjudication within the meaning of the EAJA. *Id.* at 47-48. Similarly, this Court owes no deference to the NRC's position that the Section 189a hearing requirement does not mandate an on-the-record hearing within the meaning of the APA. *See also Benavides v. Bureau of Prisons*, 995 F.2d 269, 272 n.2 (D.C. Cir. 1993) (*Chevron* deference "does not apply to agency interpretations of statutes . . . that are administered by multiple agencies.").

Moreover, any deference that might have been due the Commission's longstanding interpretation of Section 189a as requiring an on-the-record hearing was lost when the Commission reversed its position. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (degree of deference due to agency depends on, among other things, the consistency of the agency's position).

II. EVEN IF SECTION 189a DOES NOT REQUIRE ON-THE-RECORD HEARINGS IN REACTOR LICENSING CASES, THE NEW RULE IS ARBITRARY AND CAPRICIOUS.

Even if the NRC's new rule reversing its long-standing conclusion that Section 189a requires on-the-record hearings with respect to reactor licensing proceedings does not violate the AEA, the NRC acted arbitrarily and capricously in adopting it, and the rule should be set aside. 5 U.S.C. § 706(2)(A).

A. The NRC Has Departed Significantly from its Own Precedent Without Supplying a Rational Basis for the Change.

Although "agencies may 'refine, reformulate or even reverse their precedents in the light of new insights and changed circumstances,'" *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 290 (1st Cir. 1995) (quoting *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)), an agency must provide an explanation establishing that the change is reasonable. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) and *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993)). The NRC admits that it has reversed course after nearly a half-century of precedent. "The fact that there may have been a long-standing Commission position that hearings must be conducted under Subpart G — at least with respect to reactor licensing — does not by itself prevent the Commission from taking a different view, and providing for less-

formal hearing procedures, rather than the full panoply of discovery and cross-examination under Subpart G." 69 Fed. Reg. 2192. In doing so, however, the NRC has provided only conclusory explanations for the change. *E.g.,* 69 Fed. Reg. 2182 (the use of Subpart G procedures in licensing actions "is not as effective as it could be"); 69 Fed. Reg. 2188 (there is a need "to avoid needless delay and unproductive litigation"); 69 Fed. Reg. 2206 ("greater use of more informal hearing procedures is desirable"). The NRC never responded to calls for a study to determine whether a delay problem existed with regard to reactor licensing hearings and whether informal hearings would solve the problem. Instead, it plowed forward based on unsupported assumptions and anecdotes.

Indeed, if anything, the record indicates that informal proceedings are no more efficient than formal proceedings. In its original analysis of the hearing process, the OGC cautioned the NRC that:

> [N]o one should imagine that a shift from formal to informal proceedings is a panacea that will bring about rapid proceedings, increase public acceptance, or solve the various problems of the nuclear power industry. The principal reason that proceedings are lengthy is usually that the subject matter is technical and complex, issues are numerous, and the parties far apart in their view of the appropriate outcome. And we have seen, from our experience with materials licensing cases under Subpart L, that informal procedures are no guarantee of a speedy and uncomplicated proceeding.

JA 14. Similarly, commenters and participants at the facilitated meeting expressed the view that efficiency could be promoted and delay averted by better case management under the formal procedures, JA 257, 266, a solution that would not impede meaningful public participation unlike the abolition of discovery and cross-examination. Participants offered examples of delays where formal hearing procedures were not to blame. JA 368. Thus, the NRC's unsupported assumption that on-the-record hearings account for the delay in the reactor licensing process cannot provide a rational basis to justify its departure from decades of precedent. Similarly, the NRC's change in position as to whether the statute permits informal proceedings is not an adequate explanation for using that authority to abolish formal hearings in favor of informal proceedings.

In addition, the NRC has acted arbitrarily and capriciously by reneging on a historic bargain. Under the Price-Anderson Act, the nuclear industry was granted an exemption from state and local regulation and received limitations on liability in exchange for accepting extensive hearings under the federal licensing system. *See* JA 704-05, 768-69, and authorities cited therein. Thus, citizens in affected communities gave up local regulation in return for a commitment that they could protect themselves through a full panoply of trial-type proceedings during the licensing process. *Id.* The final rule at issue revokes the public's benefit of that

historic bargain, while the industry continues to be exempt from state and local regulation.

B. The NRC Has Acted Arbitrarily and Capriciously by Providing Formal Hearings in High-Level Waste Repository Proceedings for Policy Reasons that Apply Equally to Reactor Licensing Proceedings.

In arriving at the final rule, the NRC considered using the informal procedures of Subpart L for proceedings relating to a HLW repository, but chose instead to use the formal Subpart G procedures. The NRC explained that it chose to apply formal hearing procedures in HLW proceedings because: 1) HLW proceedings are likely to be controversial; 2) they will involve a large number of complex issues; and 3) the NRC raised the public's expectations by stating that it would provide formal hearings for HLW repository licensing, and to now provide only informal hearings "would not advance public confidence in the Commission's repository licensing process." 69 Fed. Reg 2204. Each of the three reasons on which the NRC based its decision to use formal hearings in HLW proceedings applies with equal force to reactor licensing proceedings.

First, at the outset of the rulemaking process, the NRC acknowledged the continuing "controversy that has accompanied nuclear power since its inception." JA 2. Indeed, that the NRC received 1,422 comments opposing the new rule

demonstrates that NRC licensing proceedings are controversial and that interested parties desire full participatory rights in the adjudicative process. Second, it is not disputed that reactor licensing proceedings involve a large number of complex issues. *See, e.g.,* JA 14. Third, the NRC's repeated statements for nearly fifty years that formal hearings are required by law has certainly raised the public's expectation that such hearings will be provided.

The NRC has not provided a reasoned analysis for its differing treatment of HLW repository proceedings and reactor licensing proceedings. Therefore, the rule should be vacated as arbitrary and capricious. *State Farm*, 463 U.S. at 42 (under the arbitrary and capricious standard, a reviewing court may set aside an agency rule that is not rational).

C. The NRC Has Acted Arbitrarily and Capriciously by Banning the Cross-Examination of Expert Witnesses Even Though Cross-Examination Is Well-Suited to Resolving Scientific Issues and an Important Tool for Public Participation.

In reactor licensing proceedings relegated to the informal procedures of Subpart L, citizen intervenors have lost the right to cross-examine expert witnesses hired by the industry. This result is arbitrary and capricious because it is based on the irrational assumption that cross-examination of scientific experts is not useful,

and because it ignores the fact that citizen intervenors with limited resources often must use cross-examination of industry experts to identify major safety problems.

In promulgating the final rule, the NRC simply declared that cross-examination "does not appear to be either necessary or useful in circumstances where, for example, the dispute falls on the interpretation of or inferences arising from otherwise undisputed facts." 69 Fed. Reg 2196. According to the NRC, cross-examination may be useful to determine the credibility of competing eyewitnesses, but not for adjudicating scientific and technical disputes that rest on the opinions of experts. 69 Fed. Reg. 2222. The NRC's abandonment of the right of cross-examination in reactor licensing proceedings is arbitrary and capricious because it ignores the substantial utility of expert cross-examination. As the ASLBP — the Commission body that presides at licensing adjudications — explained in urging the NRC not to abolish cross-examination:

> [T]he experience of members of the Licensing Board Panel garnered over a period of many years of involvement in the NRC adjudicatory process teaches the enormous potential value of the availability of party cross-examination. This is especially so with regard to expert testimony offered by one or another of the parties (including the NRC staff) on safety or environmental issues of a highly technical nature. That testimony might appear on its face to be very persuasive. Yet, a focused interrogation of its sponsor by one well versed in the subject matter respecting the underpinnings of the testimony might very well disclose assumptions made or inferences drawn that are sufficiently

> dubious to bring the probative value of all or a material part of the testimony into serious question.

JA 568. The ASLBP further explained that "[t]he knowledge that cross-examination is available to opposing counsel [] helps to ensure that all parts of the witnesses' testimony [are] well thought out and fully supportable and that exaggeration and hyperbole are kept to a minimum because the sponsor of the testimony knows that it might have to be defended fully under vigorous cross-examination." *Id.* The NRC ignored the comments of the ASLBP and others regarding the importance of cross-examination of expert witnesses. By focusing solely on cross-examination in the context of fact disputes, the NRC failed to address the altogether different purpose served by the cross-examination of experts. This failure to consider an important aspect of the problem renders the new rule arbitrary and capricious. *State Farm*, 463 U.S. at 42.

The NRC's failure to address the utility of cross-examination of technical experts is particularly striking given the courts' consistent recognition that cross-examination of experts is not only important, but is the proper procedure for a party to challenge the accuracy of an expert's opinion. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (noting adversary system's reliance on "vigorous cross-examination" as a safeguard to questionable

scientific testimony); *Symbol Technologies, Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991), and cases cited therein. Similarly, in 1970, the Supreme Court, recognizing the importance of expert testimony and a litigant's need for discovery to cross-examine an expert properly, adopted Rule 26(b)(4) of the Federal Rules of Civil Procedure to provide enlarged discovery from expert witnesses. Indeed, the NRC itself, in a 1975 decision upholding an Appeal Board ruling that intervenors must be allowed to conduct cross-examination, found that cross-examination is of vital importance to meaningful public participation in the NRC's adjudicatory process. *N. States Power Co.*, 1 NRC 1, 2 (1975).

Finally, although the NRC acknowledged the receipt of comments explaining that cross-examination "is crucially important to intervenors who lack the resources to submit their own expert testimony, but who have valid concerns about an applicant's case," 69 Fed Reg. 2195, it never addressed this point before declaring, in wholly conclusory fashion, that cross-examination of experts is neither necessary nor useful. In fact, because citizen intervenors historically have used cross-examination of industry experts to extract concessions and expose weaknesses in the licensee's case, JA 698, 701-02, 714, 681, 748, the loss of this valuable tool has further diminished the public's ability to participate meaningfully in reactor licensing proceedings, with adverse consequences for health and safety.

CONCLUSION

The Court should vacate the final rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certifying that the foregoing Brief for Petitioners complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (not including those parts excluded under the Federal Rules of Appellate Procedure) contains 8,844 words.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on June 7, 2004, he caused two copies of the foregoing Brief for Petitioners to be served by first-class U.S. mail, postage prepaid, on the following:

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